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No. 86-1449

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

FEDERAL INSURANCE COMPANY & COMETALS, INC.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, by virtue of its actions in this case, the United States may be equitably estopped from collecting import duties owed by an importer and its surety.

2. If not, whether the importer may pursue a separate counterclaim aganist the United States for equitable recoupment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-27a) is reported at 805 F.2d 1012. The opinion of the Court of International Trade (Pet. App. 29a-44a) is reported at 605 F.Supp. 298. A previous opinion of the Court of International Trade (Pet. App. 45a-47a) is reported at 6 Ct. Int'l Trade 243.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1986. A petition for rehearing was denied on December 8, 1986 (Pet. App. 28a). The petition for a writ of certiorari was filed on March 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On May 7, 1980, petitioner Cometals, Inc., imported 715 drums of titanium sponge into the United

States (Pet. App. 3a). Cometals had included the amount needed to pay the duties on this merchandise in a check sent on May 2, 1980 to its customhouse broker, James Loudon & Co., but Loudon had not yet forwarded that payment to the Customs Service (*id.* at 4a). Nevertheless, since Cometals and its surety, co-petitioner Federal Insurance Company, had executed and delivered to the Customs Service a general term bond guaranteeing payment of the import duties, the Customs Service released the merchandise on its date of entry (*ibid.*).

On May 12, 1980, Loudon issued an uncertified check to the Customs Service in purported satisfaction of Cometals' obligation (Pet. App. 4a). Since an entry bond for the duties was on file, the Customs Service accepted the uncertified check (*ibid.*). Loudon's bank subsequently refused to honor the check, however, because of insufficient funds (*ibid.*). The Customs Service requested and received another check, but it too was returned for insufficient funds (*ibid.*). The Customs Service accordingly asked petitioners to pay the duties owed on the titanium sponge directly (*id.* at 4a-5a). Petitioners refused (*id.* at 5a).

The United States then instituted suit in the Court of International Trade to collect the unpaid duties (Pet. App. 5a). Petitioners responded that the United States should be "equitably estopped" from collecting those duties or, in the alternative, that the United States should be held liable to petitioners for not adequately supervising Loudon or for failing to notify petitioners of Loudon's precarious financial position (*ibid.*).[1] In support of its affirmative defense and counterclaims, petitioners asserted that the

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[1] Petitioners based their counterclaims on the Federal Tort Claims Act (28 U.S.C. 2671), the Tucker Act (28 U.S.C 1491), the Administrative Procedure Act (5 U.S.C. 701), and a theory of equitable recoupment. See Pet. App. 46a.

Customs Service accepted Loudon's uncertified check even though Loudon did not have a bond on file, that the Customs Service had not followed up on an October 1977 audit showing that Loudon had a severe net worth deficiency, and that the Customs Service continued to accept checks from Loudon even though, in late 1979 and early 1980, at least six of Loudon's uncertified checks were returned because of insufficient funds (*id.* at 6a, 31a).

2. The Court of International Trade granted judgment to petitioners (Pet. App. 29a-43a, 45a-47a). It found itself without jurisdiction to adjudicate petitioners' various counterclaims, except the counterclaim for "equitable recoupment" (*id.* at 46a). The court agreed, however, that the government should be "equitably estopped from recovering on its claim" (*id.* at 30a). The court determined that the Customs Service had violated 19 C.F.R. 24.1(a)(3) by accepting Loudon's uncertified check when Loudon did not have its own bond on file,[2] finding the Customs Service's contrary argument—that an uncertified check may be accepted wherever *any* bond for the duties owed on particular merchandise has been posted—inconsistent with three statutory provisions, 19 U.S.C. 66,[3] 19 U.S.C.

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[2] 19 C.F.R. 24.1(a)(3) provides, in pertinent part, "[a]n uncertified check * * * shall be accepted if there is on file with the district director [an entry bond or other] bond to secure the payment of the duties, taxes, or other charges * * *."

[3] 19 U.S.C. 66 provides that the Secretary of the Treasury "shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations not inconsistent with law, to be used in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports, or to warehousing, and shall give such directions to customs officers and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law."

1641(d),[4] and 19 U.S.C. 1648,[5] each of which, the court said, exists to protect importers from fraud by unscrupulous brokers (Pet. App. 31a-36a). And the court further found (*id.* at 37a) that, by failing to follow up on the September 1977 audit and by redepositing Loudon's "bouncing checks," the Customs Service had engaged in "loose enforcement" of 19 C.F.R. 111.27,[6] and therefore "was directly responsible for endangering the payment of duties by Cometals."

3. A divided panel of the Federal Circuit reversed and remanded with instructions that judgment be entered for the government (Pet. App. 2a-27a). The majority noted that its predecessor, the Court of Customs and Patent Appeals, had unequivocally held that " 'equitable estoppel, even if available in cases involving the Government in its proprietary capacity, is not available against the Government in cases involving the collection or refund of duties on imports' " (Pet. App. 7a, quoting *Air-Sea Brokers, Inc.* v. *United States,* 596 F.2d 1008 (C.C.P.A. 1979)). Nor was

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[4] 19 U.S.C. 1641(d), which is part of a section concerning the regulation of customhouse brokers, provides, in pertinent part, that the "Secretary of the Treasury shall prescribe such rules and regulations as he may deem necessary to protect importers and the revenue of the United States, and to carry out the provisions of this section * * *."

[5] 19 U.S.C. 1648 provides, in pertinent part, that "Customs officers may receive uncertified checks * * * during such time and under such rules and regulations as the Secretary of the Treasury shall prescribe; but if a check so received is not paid[,] the person by whom such check has been tendered shall remain liable for the payment of the duties and for all legal penalties and additions to the same extent as if such check had not been tendered."

[6] 19 C.F.R. 111.27 provides, in pertinent part, that "[t]he Regional Director, Regulatory Audit, shall make such audit or inspection of the books and papers required by this subpart * * * as may be necessary to enable the district director and other proper officials of the Treasury Department to determine whether or not the broker is complying with the requirements of this part."

the majority "inclined to recommend reconsideration * * * *in banc*" because, even if "an equitable estoppel might be found in extraordinary circumstances, * * * [t]here is no 'illegal' conduct by the agency on which to predicate an estoppel in this case" (Pet. App. 8a (emphasis in original)). And, the majority added, the counterclaim for "equitable recoupment" fails "for the same reason as the defense of estoppel" (*id.* at 5a n.2).

a. On the equitable estoppel issue, the majority rejected the Court of International Trade's conclusion that 19 C.F.R. 24.1(a)(3) "must be interpreted to require that an uncertified check of a broker shall be accepted only if a bond has been posted *by the broker*" (Pet. App. 8a (emphasis in original)). The majority found that "[t]he Secretary * * * has taken the position, since at least 1955, that the government must accept an uncertified check if the bond *of any interested party* is posted covering the payment of the duties for which the check is tendered" (*ibid.* (emphasis in original)), and that Congress has not "undertaken to overrule the Secretary's interpretation despite numerous opportunities since 1955" (*id.* at 9a). The majority further noted that the Secretary's interpretation of 19 C.F.R. 24.1(a)(3) is not inconsistent with the three statutory provisions cited by the Court of International Trade, finding that 19 U.S.C. 66 "is of no significance to the issue of whether the Secretary's interpretation of section 24.1[(a)](3) is legal or illegal" (Pet. App. 10a); that, while it directs the Secretary to prescribe regulations protecting importers and the revenue of the United States, 19 U.S.C. 1641 does not require "that the regulations must protect importers from all improvident or malicious acts of brokers" or that the Secretary must "protect each importer from a particular financial loss or injury by a particular broker" (Pet. App. 13a, 14a); and, finally, that, "under section 1648, the broker cannot 'remain' liable for duties for which it was never liable" (*id.* at 15a). In view

of these considerations, the majority found that "the Secretary's interpretation of 19 C.F.R. [] 24.1[(a)](3) is reasonable" (*id.* at 16a).

The majority further found implausible the suggestion that the Customs Service could be estopped because it had not warned petitioners of Loudon's financial problems or prior history of submitting bad checks (Pet. App. 2a-3a, 14a-16a). Initially, the majority noted that "a licensed broker is the agent of the importer, not of the government," and that "[t]he importer and his surety remain liable for duties owed to the government regardless of the malfeasance or misfeasance of a broker" (*id.* at 3a). And, while agreeing that "these statutory provisions are designed to protect the importing community by giving the Secretary the power to regulate the conduct of brokers and to reduce, thereby, the possibility of fraud to a minimum," the majority further noted that the grant of (or failure to revoke) a license does not "constitute a representation by the government that the broker will on all occasions properly handle the business of a client" (*id.* at 14a n.4); indeed, it was "inconceivable to the majority that the government could be held under an obligation to warn importers away from a broker who is licensed, or may publicly disclose a broker's financial condition" (*id.* at 14a n.5). Thus, the majority concluded that it is improper to estop the government for failing "to advise all importers or any particular importer that a particular broker is in a possibly shaky [position]" (*id.* at 14a).

b. Judge Newman dissented (Pet. App. 17a-27a). She saw this as a case involving "neglect of duty by government agents in administering a statute enacted for the purpose of protecting importers and the United States against the notorious potential for abuse by customhouse brokers" (*id.* at 17a). She stressed that "Loudon's history of bad checks and negative net worth was well known to the Customs Service" (*id.* at 19a) and that, "[d]espite its

knowledge * * *, the Customs Service conducted no audit after 1977 of Loudon's financial condition, took no action in connection with Loudon's license, required no bond from Loudon, and did not tell the importer when its broker's checks were dishonored" (*id.* at 20a). She argued that "[t]he trial court was entitled to consider these circumstances in reaching its equitable decision" (*id.* at 22a), and, furthermore, that "the presence of Cometals' bond is [not] a sufficient excuse for the government's laxness, if not acquiescence, in Loudon's financial footwork when the Treasury regulations require the government to license only financially sound customs brokers" (*id.* at 22a). "On this record," she concluded, "the imposition of equitable estoppel is supported by precedent" (*id.* at 23a).

DISCUSSION

The decision below is correct. It does not conflict with any decision of this Court or with the decision of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioners principally contend (Pet. 11-13) that the decision that the government could not be estopped from collecting import duties in this case conflicts with decisions of this Court and other courts. But petitioners mischaracterize the decision below and, even if their characterization were correct, there is no conflict.

The decision below did not rest, as petitioners contend, on the general rule that the government may not be estopped from collecting import duties or taxes. The court below "assume[d] that an equitable estoppel might be found in extraordinary circumstances" (Pet. App. 8a). It determined, however, that "[t]here is no 'illegal' conduct by the agency on which to predicate an estoppel in this case" (*ibid.*). Its statement that the government may never be estopped from collecting import duties is, therefore, only dictum, and is not a basis for review by this Court.

See *Mississippi University for Women* v. *Hogan,* 458 U.S. 718, 723 n.7 (1982); *Black* v. *Cutter Laboratories,* 351 U.S. 292, 297 (1956).

Moreover, neither this Court nor any court of appeals has ever held that the United States may be estopped from collecting import duties or taxes. To the contrary, this Court has declined to decide whether there are any circumstances at all in which estoppel may run against the government. See, *e.g., United States* v. *Locke,* 471 U.S. 84, 90 n.7 (1985); *Heckler* v. *Community Health Services,* 467 U.S. 51, 60 (1984). And it has said that the considerations barring estoppel of the government are most weighty when the public fisc is at risk. See *Schweiker* v. *Hansen,* 450 U.S. 785, 788 & n.4 (1981); *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380, 385 (1947). Thus, as noted in the decision below (Pet. App. 7a-8a), the appellate courts with responsibility for interpreting the customs statutes have held that, even if available in cases where the government is acting in its proprietary capacity, equitable estoppel is not available in cases where the government is collecting import duties or other taxes. See *United States* v. *Bar Bea Truck Leasing Co.,* 713 F.2d 1563, 1567 (Fed. Cir. 1983); *United States* v. *Reliable Chemical Co.,* 605 F.2d 1179, 1184 (C.C.P.A. 1979); *Air-Sea Brokers, Inc.* v. *United States,* 596 F.2d 1008, 1011 (C.C.P.A. 1979). The cases cited by petitioners do not involve the collection of import duties or taxes.[7] Therefore, there is no circuit conflict.

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[7] See *Meister Bros.* v. *Macy,* 674 F.2d 1174 (7th Cir. 1982) (federal flood insurance program); *Corniel-Rodriguez* v. *INS,* 532 F.2d 301 (2d Cir. 1976) (deportation program); *United States* v. *Lazy FC Ranch,* 481 F.2d 985 (9th Cir. 1973) (soil bank program); *Brandt* v. *Hickel,* 427 F.2d 53 (9th Cir. 1970) (oil and gas lease program); *United States* v. *Georgia-Pacific Co.,* 421 F.2d 92 (9th Cir. 1970) (national forest program); *Emeco Industries, Inc.* v. *United States,* 485 F.2d 652 (Ct. Cl. 1973) (government contract dispute).

2. Petitioners next argue (Pet. 13-17) that the court below erred in holding that there was no illegal conduct by the agency on which to predicate an estoppel in this case. This argument is meritless.

Contrary to petitioners' suggestion (Pet. 13-15), 19 U.S.C. 1641 does not impose on the Customs Service a legal duty to importers to protect them against fraud by their brokers. It provides that the "Secretary of the Treasury shall prescribe such rules and regulations as he may deem necessary to protect importers and the revenue of the United States * * * " (19 U.S.C. 1641(d)). It thus gives "the Secretary the power to regulate the conduct of brokers and to reduce, thereby, the possibility of fraud to a minimum" (Pet. App. 14a).[8] But it does not "direct that the regulations must protect importers from all improvident or malicious acts of brokers" (*id.* at 13a), or that the Secretary must "protect each importer from a particular financial loss or injury by a particular broker" (*id.* at 13a-14a), nor does it entitle importers to look to the Customs Service for recompense for such a loss when it occurs. There is no indication that Congress intended that the Secretary's licensing decisions would "constitute a representation by the government that the broker will on all occasions properly handle the business of a client" (*id.*

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[8] The only comment on 19 U.S.C. 1641 that we have found in the legislative history is as follows (S. Rep. 1170, 74th Cong., 1st Sess. 3 (1935)):

> Although the great majority of these brokers are entirely above reproach in the conduct of their business, the corrupt practices of a few, unhampered by adequate statutory provisions for supervision, have proved a grave menace to importers and customs revenue alike. The present amendments are designed to remedy this situation. They will give to the Secretary of the Treasury the power to regulate the conduct of the business of customhouse brokers in such a manner that the opportunity for fraudulent practices will be reduced to an absolute minimum.

at 14a n.4). Indeed, as the court below noted (*id.* at 14a n.5), it is "inconceivable * * * that the government could be held under an obligation to warn importers away from a broker who is licensed, or [to] publicly disclose a broker's financial condition" (*ibid.*). The government simply is not in a position to conduct the monitoring necessary to fulfill—and has not undertaken—any such obligation. Cf. *id.* at 14a n.4.

Petitioners therefore err in suggesting (Pet. 15-16) that the Customs Service violated any statute or regulation in its dealings with petitioners and Loudon in this case. The Customs Service did not violate any statute or regulation by accepting Loudon's various uncertified checks without having a bond from Loudon on file; petitioners had posted a bond to cover the duties owed in respect of this merchandise and, as the court below noted (Pet. App. 8a, 16a (emphasis in original)), "[t]he Secretary * * * has taken the position, since at least 1955, that the government must accept an uncertified check if the bond of *any interested party* is posted covering the payment of duties for which the check is tendered." Congress has not "undertaken to overrule the Secretary's interpretation despite numerous opportunities" (*id.* at 9a), and the Secretary's position is a "reasonable" one (*id.* at 16a). Finally, the Customs Service violated no law or regulation by failing to notify Cometals that Loudon's 1977 audit showed a severe net worth deficiency or that Loudon had submitted bad checks on other occasions; as the court below noted (Pet. App. 3a, 14a), "a licensed broker is the agent of the importer, not of the government," and 19 U.S.C. 1641 "imposes no obligation on the government to advise all importers or any particular importer that a particular broker is in a possibly shaky financial condition."[9]

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[9] Moreover, as the court below noted, "[s]ection 1641(b) is designed to provide a large measure of [procedural] protection for brokers" (Pet. App. 14a n. 5). "The suggestion that the government must warn

Thus, petitioners are plainly wrong in suggesting (Pet. 16-17) that any loss suffered here is the fault of the Customs Service. Loudon was petitioners' agent. See *Corrigan* v. *United States,* 35 C.C.P.A. 10, 18 (1947). Petitioners apparently made no effort to assess Loudon's financial stability. Yet any responsible importer or surety would have done so. See *Magee* v. *Manhattan Life Insurance Co.,* 92 U.S. 93, 98 (1875). Indeed, petitioners could have avoided this entire dispute by submitting their payment directly to the government,[10] but they elected to send their payment to Loudon and to ask that the merchandise be released on the basis of the guarantee bond that they had executed. It is entirely just that petitioners should remain responsible for the import duties that are owing. See 19 C.F.R. 141.1(b); *Meredith* v. *United States,* 38 U.S. (13 Pet.) 486, 493 (1839).

3. Finally, petitioners' argument (Pet. 17-19) that, even if the government may not be estopped from collecting import duties, the government should be held liable on a counterclaim of "equitable recoupment" is untenable. As the Court of International Trade noted (Pet. App. 46a), this claim in recoupment, which is a type of equitable set-off, is based on the same underlying facts and law as petitioners' defense of equitable estoppel. Accordingly, the court below correctly held that it "fails * * * for the same reason as the defense of estoppel" (*id.* at 5a n.2);

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prospective clients against a broker would circumvent these safeguards * * * (*ibid.*).

[10] The Customs Service has since amended its regulations to require customhouse brokers to advise importers in writing that they may pay duties directly to the United States and that payment to the broker does not relieve the importer of liability. See 19 C.F.R. 111.29(b)(1)

there is no "affirmative misconduct" warranting application of any brand of estoppel in this case.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[11] Petitioners apparently argue (Pet. 19) that the court below held itself without jurisdiction to entertain the "equitable recoupment" counterclaim. This argument misreads the decision below; the court rejected the "equitable recoupment" claim on its merits (and thus assumed that it had jurisdiction over it). See Pet. App. 5a n.2.

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